

**84-141**

Office - Supreme Court, U.S.  
**FILED**

**JUL 9 1984**

ALEXANDER L. STEVAS,  
CLERK

NUMBER:

**IN THE SUPREME COURT  
OF THE  
UNITED STATES**

Howard Scott, In derivative Action on behalf of  
LAVENDER HOUSE, INC., a public stock  
company, his wife Shirley and himself

Henry Yarbrough, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Howard L. Jenkins, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Oliver A. Darden, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Petitioners

vs.

Small Business Administration

Respondent

October Term  
1984

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On Appeal from the United States Court of Appeals  
For the Third Circuit in Cases No. 83-1546 and 83-1572

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Appendix attached herein

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**PETITION FOR WRIT OF CERTIORARI**

---

Henry Yarbrough  
P.O. Box 27486  
6615 Blakemore Street  
Philadelphia, Pennsylvania 19150

Howard L. Jenkins  
827 South St. Bernard Street  
Philadelphia, Pennsylvania 19143



## QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER AN EX PARTE TRIAL IN A UNITED STATES DISTRICT COURT IS A VIOLATION OF CONSTITUTIONAL DUE PROCESS AND THE CIVIL RIGHTS OF THE ABSENT PARTIES.
- II. WHETHER THERE IS A RIGHT FOR SHAREHOLDER MEMBERS OF A DERIVATIVE ACTION UNDER RULE 23.1., FRCP, TO BE NOTIFIED IF THEIR ACTION IS TO BE DISMISSED OR COMPROMISED ESPECIALLY WHERE THE DERIVATIVE ACTION PROVISION IS USED TO DELIVER A BINDING JUDGMENT AGAINST THE ABSENT MEMBERS.
- III. WHETHER A LAYMAN NON-LAWYER PRO SE LITIGATION IN A UNITED STATES DISTRICT COURT IS BINDING ON UN-NOTIFIED OTHER PARTIES.

## PARTIES TO THIS PROCEEDING

The caption of the case in this Court contains the names of all the parties.



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## J U R I S D I C T I O N

Jurisdiction in this Court is provided for under the provision of Title 28, Section 1254, United States Code, for the review of final decisions of United States Court's of Appeals.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court against the petitioners on April 6, 1984. App. page 6-A.

The United States Court of Appeals for the Third Circuit further denied the petitioners petition for a rehearing on April 30, 1984. App. page 5-A.

A stay was granted petitioners to July 14, 1984 by the Court of Appeals to permit time for the petitioners to file this petition for writ of certiorari. App. page 7-A.

## FEDERAL LAWS OF THIS CASE

1. V Amendment, Constitution of the United States
2. Rule 23.1., Federal Rules of Civil Procedure
3. Title 28, Section 1654, United States Code
4. Civil Right Acts of 1870 and 1871





## STATEMENT OF THE CASE

The petitioners Yarbrough and Jenkins for over 12 years have been stockholders of the public company, Lavender House, Inc., the derivative action company in this case.

As stockholder members, Yarbrough and Jenkins brought the instant derivative action on behalf of Lavender House on April 1, 1983 to secure a due process constitutional trial; to secure their rights as stockholders to receive notification under Rule 23.1., Federal Rules of Civil Procedure, and, to have set aside binding judgments against Lavender House as handed down by the district court through the inexperience pro se court action by a layman.

The district court did have and did permit an unconstitutional Ex Parte trial for the benefit and favor of the respondent. Only the respondent's attorneys and the respondent's witnesses were present and did give arguments and testimony to the court at this trial. No attorney or anyone else was present at this trial to give the valid defenses of the petitioner's



public company, Lavender House; but after the respondent's one side only trial, the district court handed down a damages judgment of \$416,322.79 against the petitioner's company, Lavender House. Such an Ex Parte and one side only trial is clearly a violation of due process, 5th Amendment, Constitution of the United States.

Rule 23.1., Federal Rules of Civil Procedure, provides that a derivative action may not proceed if it appears the "plaintiff does not fairly and adequately represent the interest of the shareholder". Howard Scott the layman who brought the pro se court action could not have "fairly and adequately" represented Lavender House or any of the shareholder members. Scott's action under Rule 23.1. should have not been maintained by the court.

Further, Rule 23.1., FRCP, provides additionally that if a derivative action is to be dismissed or compromised, then notification to this effect must be sent to all the shareholder members of the action. The district court did compromise this derivative action by the granting of respondent a summary judgment, but notification of the intended compromise was



not sent to Yarbrough nor Jenkins or any other member of the action.

Title 28, Section 1654, United States Code, provides that a person may represent himself. The district court's judgments binding others to the pro se court action of a layman, Howard Scott in this case, should be forever barred. Petitioner's company, Lavender House, should be relieved of judgments caused by the court action of the layman, Scott.

By Order of April 20, 1983, the district court dismissed the Yarbrough and Jenkins signed complaint of April 1, 1983.

Ex Parte trial in a United States District Court, failure of stockholders in a derivative action to receive notification, and binding judgments on others brought by the action of a layman have never happened before in any United States Court. So Yarbrough filed his notice of appeal and docketed in the U. S. Court of Appeals on July 13, 1983 as appeal No. 83-1546. Then Jenkins followed with his

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appeal on July 29, 1983 as appeal No. 83-1572.

The United States Court of Appeals affirmed the district court's judgment against the Yarbrough and Jenkins actions on April 6, 1984. Yarbrough and Jenkins filed petition for rehearing, but rehearing was denied on April 30, 1984.

Now Yarbrough and Jenkins brings before this Court the extraordinarily important questions of their respective appeals as to whether an Ex Parte trial is a violation of their due process constitutional rights, whether Yarbrough and Jenkins and other members of the derivative action should have been notified under Rule 23.1., FRCP, before the district court compromised said derivative action, and, whether the court judgments on others are binding from the pro se court action of a layman.





## ARGUMENTS

I. WHETHER AN EX PARTE TRIAL IN A UNITED STATES DISTRICT COURT IS A VIOLATION OF CONSTITUTIONAL DUE PROCESS AND THE CIVIL RIGHTS OF THE ABSENT PARTIES.

The official and documented proof is here in the Appendix at page 1-A, Civil Dockets 97, 98 and 99, that the United States District Court did hold an Ex Parte trial for the benefit and favor to the respondent Small Business Administration.

After this trial the district court handed down a \$416,322.79 damages judgment to the respondent favor and against the absent party, the public company Lavender House. App. page 1-A, Docket 99.

The record shows clearly at docket No. 97, App. p. 1-A, that no attorney or any one else was present to give the valid defenses of Lavender House. The docket states that Scott, the layman who brought the derivative action was not present. Only the respondent's attorneys and respondent's witnesses were present to and did give arguments and testimony to the Court. App. page 1-A, dockets 97, 98 and 99.

1847

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A one side only or ex parte trial should never happen in a United States Court. Such a trial is unconstitutional and a violation of the absent parties due process as provided for in the 5th & 14th Amendment, Constitution of the United States. App. page 4-A.

Now Yarbrough and Jenkins as public stockholders of the public company Lavender House respectfully requests of this Honorable Court to grant this petition and decide for all times that a one side only trial is unconstitutional.

**II. WHETHER THERE IS A RIGHT FOR SHAREHOLDER MEMBERS OF A DERIVATIVE ACTION UNDER RULE 23.1., FRCP, TO BE NOTIFIED IF THEIR ACTION IS TO BE DISMISSED OR COMPROMISED ESPECIALLY WHERE THE DERIVATIVE ACTION PROVISION IS USED TO DELIVER A BINDING JUDGMENT AGAINST THE ABSENT MEMBERS.**

Rule 23.1., Federal Rules of Civil Procedure, a copy of which is attached to the appendix at page 3-A, provides that a derivative action may not proceed if it appears the "plaintiff does not fairly and adequately represent the interest of the shareholders".

The first part of the report is devoted to a general  
description of the country and its resources. It  
then proceeds to a detailed account of the  
various industries and occupations of the  
people. The third part of the report  
contains a list of the principal towns and  
villages, and a description of the principal  
rivers and lakes. The fourth part of the  
report contains a list of the principal  
mountains and hills, and a description of the  
principal forests and parks.

The fifth part of the report contains a list of the  
principal rivers and lakes, and a description of the  
principal forests and parks. The sixth part of the  
report contains a list of the principal mountains and  
hills, and a description of the principal forests and  
parks. The seventh part of the report contains a list  
of the principal towns and villages, and a description  
of the principal rivers and lakes. The eighth part of  
the report contains a list of the principal mountains  
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list of the principal towns and villages, and a  
description of the principal rivers and lakes. The  
tenth part of the report contains a list of the  
principal mountains and hills, and a description of  
the principal forests and parks.

Howard Scott, the plaintiff in the case Jenkins and Yarbrough now complains of, is NOT an attorney. Scott could not have adequately represented Lavender House or any of the shareholder members. Section 1654, Title 28, United States Code, app. p. 3-A, provides that a person may represent himself in a United States Court; so Scott could only have represented himself.

The district court erred by permitting the derivative action to proceed. The pro se action of Scott is now lawfully binding on petitioners and all other absent members of this derivative action. There was no due process in the light of the 5th Amendment, U. S. Constitution or of subject Rule 23.1. The absent members civil and property rights were also disregarded in violation of the Civil Right Acts of 1870 and 1871.

Rule 23.1., FRCP, provided in the appendix at page 3-A, additionally states that if a derivative action is to be dismissed or compromised, then notification to this effect must be delivered to all shareholder members of the action. No Notification was ever sent to petitioners or any other member. Yet, the action was compromised by the district court granting a



summary judgment to respondent on November 14, 1979. A copy of the judgment is in the appendix at page 2-A.

The summary judgment is now binding on petitioners and other shareholder members by the operation of subject Rule 23.1. But in turn, none of the shareholder members received their benefit from the intention of Rule 23.1 for notification. Each member could have then provided for his or her own representation. Petitioners then ask the Court to grant certiorari so that this important question of shareholder rights under Rule 23.1. may for all times be decided.

### III. WHETHER A LAYMAN NON-LAWYER PRO SE LITIGATION IN A UNITED STATES DISTRICT COURT IS BINDING ON UN-NOTIFIED OTHER PARTIES.

The civil docket in the appendix at page A-1 shows that Howard Scott brought the derivative action on behalf of the public company Lavender House. Scott is not an attorney and he is not a member of the bar of any Court. But Scott's court action has resulted in binding judgments on Lavender House. Title 28, Section 1654, United States

THE UNIVERSITY OF CHICAGO  
DEPARTMENT OF THE HISTORY OF ARTS  
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CHICAGO, ILLINOIS 60637  
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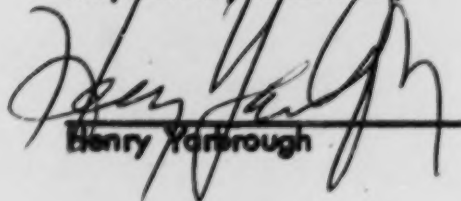
Code, app. p. 3-A, provides that one may represent himself. Judgments caused by Scott's pro se action on Lavender House should be disallowed. Petitioners therefore requests of this Court to grant this petition and decide if a layman may represent parties other than himself in the light of Title 28 Section 1654, United States Code.

There is a great deal of interest in the  
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## CONCLUSION

In consideration of the facts and the law cited above, the petitioners most respectfully requests that this petition for certiorari be granted so that the exceptionally important questions of whether an Ex Parte trial for and to the benefit of one side only is constitutional; whether the provision of Rule 23.1., FRCP, shall apply to Yarbrough and Jenkins and the other shareholder members of the public company, Lavender House, Inc., and whether judgments are binding on others when the judgments are the results of a layman's pro se court's litigation.

Respectfully submitted,



Henry Yarbrough

NUMBER:

IN THE SUPREME COURT  
OF THE  
UNITED STATES

Howard Scott, In derivative Action on behalf of  
LAVENDER HOUSE, INC., a public stock  
company, his wife Shirley and himself

Henry Yarbrough, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Howard L. Jenkins, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Oliver A. Darden, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Petitioners

vs.

Small Business Administration

Respondent

---

On Appeal from the United States Court of Appeals  
For the Third Circuit in Cases No. 83-1546 and 83-1572

---

Appendix attached herein

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APPENDIX TO PETITION FOR CERTIORARI

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Henry Yarbrough  
P.O. Box 27486  
6615 Blakemore Street  
Philadelphia, Pennsylvania 19150

Howard L. Jenkins  
827 South St. Bernard Street  
Philadelphia, Pennsylvania 19143

IN THE SUPREME COURT OF THE UNITED STATES  
OF AMERICA

Howard B. Berman, Plaintiff,  
vs.  
The United States, Defendant.

Case No. 100-1000000-0000  
Filed: 10/10/00

Plaintiff's Motion for Summary Judgment  
and for an Order of Dismissal

Respectfully submitted,  
Howard B. Berman

By: \_\_\_\_\_  
Attorney for Plaintiff

THE UNITED STATES OF AMERICA  
vs.  
Howard B. Berman

Case No. 100-1000000-0000

Plaintiff's Motion for Summary Judgment  
and for an Order of Dismissal

Respectfully submitted,  
The United States  
Attorney General

By: \_\_\_\_\_  
Attorney for Defendant

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL DOCKET NO: 78-62

Plaintiff

Scott, Howard, in Derivative  
Action on behalf of Lavender  
House, Inc., and on behalf of  
his wife Shirley & himself

Defendant

Small Business Administration

vs.

ATTORNEYS

p.p.

Robert DeLuca, USA  
William McGettigan, ASUA

Date	NR.	PROCEEDINGS
1980	*	*
May 5	97	Civil non jury trial on counterclaim of 4/28/80: Mr. Stout moves for Ms Yance's admission pro hac vice - granted; Mr. Scott not present; S.B.A.'s witnesses sworn filed.
May 5	98	Civil non jury trial on counterclaim of 4/29/80: Ms Yance makes closing argument; Court makes findings of fact; Court finds in favor of deft. on counterclaim and awards damages in total amount of \$408,483.93 with interest as of 12/11/79, deft. to submit final figure showing interest to date, filed.
May 6	99	ORDER DATED 4/29/80 THAT JUDGMENT BE ENTERED ON THE COUNTERCLAIM IN FAVOR OF SMALL BUSINESS ADMINISTRATION AND AGAINST HOWARD SCOTT, SHIRLEY SCOTT AND LAVENDER HOUSE, INC., JOINTLY AND SEVERALLY IN THE AMOUNT OF \$416,322.79, FILED. 5/7/80 entered & copies mailed.

\*

\*

\*



UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON, D. C. 20250

OFFICE OF THE SECRETARY

Room 1000, Department Building

Washington, D. C. 20250  
Telephone: 447-3000  
Telegrams: 447-3000  
Teletypes: 447-3000

GENERAL INFORMATION

The Department of Agriculture is the lead agency for the Federal Government in the field of agriculture, forestry, and related fields. It is responsible for the development and implementation of policies and programs that affect the production, distribution, and consumption of agricultural products.

The Department is organized into several major offices, including the Office of the Secretary, the Office of the Assistant Secretary for Policy and Planning, the Office of the Assistant Secretary for Administration, and the Office of the Assistant Secretary for International Affairs.

The Department also has a number of field offices located throughout the United States and in foreign countries. These offices are responsible for carrying out the Department's programs and policies in their respective areas.

The Department's programs and policies are designed to promote the production and distribution of agricultural products, to protect the health and safety of the consumer, and to conserve the natural resources of the United States.

The Department's programs and policies are also designed to promote the economic well-being of the agricultural community and to improve the quality of life for all Americans.

The Department's programs and policies are based on the principles of fairness, equity, and efficiency. They are designed to be flexible and responsive to the needs of the agricultural community and to the needs of the American people.

The Department's programs and policies are also designed to be consistent with the policies and programs of the other Federal agencies. They are designed to work together to achieve the common goals of the Federal Government.

The Department's programs and policies are also designed to be consistent with the policies and programs of the State and local governments. They are designed to work together to achieve the common goals of the Federal Government, the State and local governments, and the American people.

The Department's programs and policies are also designed to be consistent with the policies and programs of the private sector. They are designed to work together to achieve the common goals of the Federal Government, the private sector, and the American people.

The Department's programs and policies are also designed to be consistent with the policies and programs of the international community. They are designed to work together to achieve the common goals of the Federal Government, the international community, and the American people.

For more information, contact the Office of the Secretary.

Room 1000, Department Building  
Washington, D. C. 20250

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD SCOTT, et al. : CIVIL ACTION  
vs :  
SMALL BUSINESS ADMINISTRATION : NO. 78-62

O R D E R

AND NOW, this 9th day of NOVEMBER, 1979, it is  
hereby

ORDERED that the plaintiff's motion to amend the  
complaint be and the same is hereby DENIED.

IT IS FURTHER ORDERED that the defendant's motion  
for summary judgment be and the same is hereby GRANTED  
and JUDGMENT is entered in favor of the defendant and  
against the plaintiff.

BY THE COURT:

s/ Joseph L. McGlynn, Jr  
JOSEPH L. MC GLYNN, JR J.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, Plaintiff,  
vs.  
JANE SMITH, Defendant.

Case No. 123456789

FILED

CLERK OF COURT

U.S. DISTRICT COURT

WASHINGTON, D.C.

DECEMBER 15, 2023

BY: [Signature]

U.S. DISTRICT COURT

WASHINGTON, D.C.

DECEMBER 15, 2023

JOHN DOE, Plaintiff,  
vs.  
JANE SMITH, Defendant.

**RULE 23.1. DERIVATIVE ACTIONS BY SHAREHOLDERS,  
FEDERAL RULES OF CIVIL PROCEDURE, IS AS FOLLOWS:**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

**TITLE 28, SECTION 1654, UNITED STATES CODE, appearance personally or by counsel is as follows:**

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.



V AMENDMENT, CONSTITUTION OF THE UNITED STATES,  
is as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTIONAL CONVENTION TO THE PEOPLE

The people of the State of New York, in order to amend the Constitution of the State, do hereby elect a Constitutional Convention to meet on the first day of January, 1894, at the City of New York, for the purpose of amending the Constitution of the State.

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 83-1546

No. 83-1572

HOWARD SCOTT, Derivative Action on behalf  
of the public company Lavender House, Inc.,  
his wife Shirley, and, himself

v.

SMALL BUSINESS ADMINISTRATION, an Independent Agency  
of the United States of America

Henry Yarbrough, a derivative action plaintiff  
Appellant in No. 83-1546

Howard L. Jenkins and Howard Scott  
Appellants in No. 83-1572

(Civil No. 83-1553 - E.D. Pa.)

---

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, Aldisert, Adams, Gibbons,  
Hunter, Weis, Garth, Higginbotham, Sloviter, and Rosenn,  
Circuit Judges

The petition for rehearing filed by Appellants Yarbrough and Jenkins in the above entitled cases having been submitted to the Judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

s/ Seitz

DATED: April 30, 1984

---

Collins J. Seitz  
Chief Judge



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

NO. 13-135

FILED 10-10-13

STATE OF NEW YORK, Plaintiff,  
vs.  
JOHN J. BROWN, Defendant.

On appeal from the judgment of the  
Supreme Court of the State of New York.

Presented by the appellant,  
JOHN J. BROWN.

Presented by the appellee,  
STATE OF NEW YORK.

Argued and heard at New York City,  
New York, on the 10th day of October, 1913.

THE COURT (per Chief Justice)

On appeal from the judgment of the  
Supreme Court of the State of New York,  
in the case of the State of New York  
vs. John J. Brown.

The defendant was convicted of the crime of  
murder in the first degree, and was sentenced  
to the State Prison for a term of years.  
The State of New York is entitled to a  
judgment of conviction and sentence.  
The defendant is entitled to a judgment  
of acquittal and discharge.

By the Court:  
J. BROWN  
[Signature]  
Clerk of Court

DATE: April 10, 1914

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 83-1572

HOWARD SCOTT, Derivative Action on behalf  
of the public company, Lavender House, Inc.,  
his wife Shirley, and, himself

v.

SMALL BUSINESS ADMINISTRATION, an Independent Agency  
of the United States of America

Howard L. Jenkins and Howard Scott, Appellants

(Civil No. 83-1553 - E. D. Pa.)

DISTRICT JUDGE: Honorable Norma L. Shapiro

Submitted Under Third Circuit Rule 12(6)  
March 23, 1984

BEFORE: SEITZ, Chief Judge, BECKER, and ROSENN,  
Circuit Judges

---

JUDGMENT ORDER

After consideration of the contentions raised by  
appellants, it is

ADJUDGED AND ORDERED that the judgment of the  
district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court

s/ Seitz

---

Chief Judge

ATTEST:

s/ Sally Mrvos

---

Sally Mrvos, Clerk

DATED: Apr 6 1984

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 23-127

ROBERT J. ROY, Plaintiff,  
vs.  
The United States, Defendant.

ON PETITION FOR WRIT OF HABEAS CORPUS  
AND FOR WRIT OF HABEAS AD ADAMUS

FILED - 12-1-12

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before the Honorable Judge [Name]  
[Date]

ROBERT J. ROY, Plaintiff,  
vs.  
The United States, Defendant.

MEMORANDUM OF DECISION

A writ of habeas corpus is a remedy available to a person who is detained in custody without legal authority. It is a writ of right, and it is not subject to the discretion of the court. The writ is available to a person who is detained in custody without legal authority, and it is not subject to the discretion of the court. The writ is available to a person who is detained in custody without legal authority, and it is not subject to the discretion of the court.

For the Court

[Signature]  
[Name]

2012

By Sally M. [Name]

U.S. District Court

DATED: Jan 1, 2012

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

Nos. 83-1546 & 83-1572

SCOTT, HOWARD, etc.

vs

SMALL BUSINESS ADMINISTRATION, etc

Henry Yarbrough, Appellant in No. 83-1546

Howard L. Jenkins, et al., Appellants in No. 83-1572

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified Judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 14, 1984.

s/Seitz  
Chief Circuit Judge

Dated: May 21, 1984

(2)

No. 84-141

Supreme Court, U.S.  
FILED

OCT 26 1984

ALEXANDER L. STEVAS  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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HOWARD SCOTT, ET AL., PETITIONERS

v.

SMALL BUSINESS ADMINISTRATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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**REX E. LEE**

*Solicitor General*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

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988

# **In the Supreme Court of the United States**

OCTOBER TERM, 1984

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No. 84-141

HOWARD SCOTT, ET AL., PETITIONERS

v.

SMALL BUSINESS ADMINISTRATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

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## **MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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Petitioners seek review of the dismissal of their action brought under Rule 60(b)(6), Fed. R. Civ. P., to set aside a judgment awarding the government damages for default on three loans guaranteed by the Small Business Administration. (SBA).

1. Petitioners are two corporate officers of Lavender House, Inc. (a publicly held corporation), a spouse of one of the officers, and two other minority shareholders. Petitioners claim to represent themselves, other shareholders, and the company. In the first round of this litigation, petitioner Scott, president of Lavender House, filed an action against the SBA in the United States District Court for the Eastern District of Pennsylvania on behalf of himself, his wife, and the company, which was styled as a shareholders' derivative suit. That suit sought damages from the SBA for the agency's alleged unlawful conduct in connection with three

SBA-guaranteed loans made to the company. The SBA counterclaimed for damages resulting from petitioners' default on the loans.

The district court dismissed petitioners' claims on statute of limitations grounds. A trial was held on the government's counterclaim, and those petitioners who were plaintiffs in that action waived their right to appear. See App., *infra*, 3a-4a.<sup>1</sup> The court entered judgment in favor of the SBA in the amount of \$416,322.79. That judgment was affirmed without opinion by the court of appeals (659 F.2d 1070 (1981)), and this Court denied certiorari (454 U.S. 851 (1981)).

2. Petitioners then filed the instant "Independent Action Pursuant to Rule 60(b)(6)," Fed. R. Civ. P., seeking to set aside the prior judgment. Petitioners contended that the judgment was erroneous and the product of judicial bias and prejudice. The district court dismissed the action. App., *infra*, 1a-4a. It found that petitioners' new complaint lacked the requisite basis for a Rule 60(b) motion, namely, a claim of fraud, mistake, or new evidence discovered since the time of trial or any other new circumstance. In particular, the court rejected petitioners' contention that the judgment should be set aside because they were not present at the trial of the counterclaim. The court found ample un rebutted evidence in the original record showing that petitioners waived their right to be present at trial. See App., *infra*, 3a. Additionally, the court found that petitioners' claim of judicial bias or prejudice amounted to nothing more than a challenge to the correctness of the legal rulings underlying the original judgment, because there was no other evidence of bias. *Id.* at 4a. Such a challenge, the court held, was barred by res judicata. *Ibid.*

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<sup>1</sup>The opinion of the district court was omitted from petitioners' appendix and is appended hereto.

The court of appeals affirmed without opinion (Pet. App. 6A).

3. Petitioners contend (Pet. 6-7) that they should be relieved from the prior judgment because they did not appear at trial. This contention is one that should have been raised in petitioners' first appeal, and there is no basis for reviving it in the guise of a Rule 60(b) motion. In any event, the claim is insubstantial for the reasons explained by the district court (App., *infra*, 3a). There is similarly no merit to petitioners' contention (Pet. 7-9) that the district court's entry of summary judgment violated Rule 23.1, Fed. R. Civ. P. Petitioners apparently confuse the entry of judgment by the court with a decision by the parties to settle or to dismiss the action voluntarily. Finally, those petitioners who were not parties to the original action contend in conclusory fashion (Pet. 9-10) that they or the company should not be bound by the judgment in that case. It is difficult to discern the basis for this contention. To the extent petitioners are claiming that the first judgment is void because of inadequate representation, that claim was correctly rejected by both courts below. To the extent they are claiming that the res judicata effect of the decision should be limited in a future action, that contention, which seems to be without basis, has no place in a Rule 60(b) proceeding.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

OCTOBER 1984



## APPENDIX

### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD SCOTT, In Derivative	:	CIVIL ACTION
Action on behalf of the public	:	FILED
company, Lavender House, Inc.,	:	APR 20 1983
his wife Shirley, and himself	:	
	:	
	:	
v.	:	
	:	
	:	
SMALL BUSINESS ADMINISTRATION, an	:	
Independent Agency of the United	:	
States of America	:	NO. 83-1553

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[Apr. 19, 1983]

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### MEMORANDUM and ORDER

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NORMA L. SHAPIRO, J.

Howard Scott brings a derivative action on behalf of Lavender House, Inc., his wife Shirley and himself against the Small Business Administration. Plaintiff describes this action as an "Independent Action Pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, to Set Aside this Court's Judgments in Case 78-62, Motion for a Three Judge Court, and Affidavit for the Step Aside of Bias and Prejudiced Judge."

The complaint makes clear that the only relief sought on behalf of the complainants for the alleged violation of diverse civil rights of black United States citizens is to set aside a prior grant of summary judgment in defendant's

favor in Civil Action No. 78-62 (E.D. Pa.), and a money judgment in defendant's favor on its counterclaim in the amount of \$416,322.79 in the same action.

Plaintiffs appealed that decision first to the Third Circuit Court of Appeals which affirmed by judgment order, *Scott v. U.S. Department of Commerce*, 659 F.2d 1070 (3d Cir. 1981), and then to the United States Supreme Court which denied *certiori* [sic], *Scott v. Small Business Administration*, *cert. denied*, 454 U.S. 851, *rehearing denied*, 454 U.S. 1094 (1981).

Having exhausted all means of appellate review, plaintiffs filed this independent action alleging that in Civil Action No. 78-62: (a) they were denied their right to be present or have counsel present at trial; (b) the trial judge made erroneous rulings of law with regard to the securities, patent, antitrust laws and statute of limitations; and (c) the trial judge was biased and prejudiced.

Rule 60(b) provides that the court may relieve a party from a final judgment for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other ~~justifying~~ <sup>reason</sup> relief from the operation of the judgment.

Although parties generally invoke Rule 60(b) by post-trial motion in the underlying action, the rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment ...." Fed. R. Civ. P. 60(b). Nonetheless, consideration of such actions is

limited to cases of extraordinary circumstance, generally involving fraud or deception upon the court. *See, Ackerman v. United States*, 340 U.S. 193 (1950); *Klapprott v. United States*, 335 U.S. 601 (1949); 7 Moore's Federal Practice §§ 60.36-60.37. Moreover, when a case has been affirmed on appeal the district judge is not free to flout the decision of the appellate court but may reopen the judgment only if there are circumstances not previously known that compel such extraordinary relief. *See*, 11 C. Wright and A. Miller, Federal Practice and Procedure § 2873 p. 269 (1973). Plaintiffs make no claim that fraud, mistake, new evidence or any other new circumstances has been discovered since the time of trial. In the absence of such a claim, we lack the power to proceed and must abide by the *res judicata* effect of the appellate affirmance of the district court's decision.

Furthermore, the allegations set forth in plaintiffs' complaint are not appropriate to a Rule 60(b) claim. Plaintiffs argue that they were denied an opportunity to be present or represented at trial. This is contradicted by the record. On April 28, 1980, the first day of trial on defendant's counterclaim, the judge, after recognizing plaintiffs' absence, made a part of the record the special delivery notice informing plaintiffs of the date of trial. On the second day, April 29, 1980, the trial judge read into the record the following mailgram received by the court:

Plaintiffs received notice dated 4/23/80 through the mails on 4/28/80 trial scheduled that same date on the pending counterclaim. Due to short notice and illness, plaintiff is unable to appear. However, plaintiff has no objection for Court to consider in plaintiff's absence all evidence he has now filed if trial date cannot be rescheduled. Respectfully submitted Howard Scott.

Having waived his rights, Mr. Scott cannot reassert them through this independent action under Rule 60(b).\*

Finally, plaintiffs accuse the trial judge of “unprecedented bias and prejudice” but the only bias or prejudice claimed [is] in making the alleged erroneous rulings. It is axiomatic that a judge’s rulings at trial are not grounds for recusal for bias or prejudice because they can be corrected by reversal on appeal. *Johnson v. Trueblood*, 629 F.2d 287 (3d Cir. 1980). The rulings alleged to be erroneous, and therefore biased and prejudiced, have been affirmed on appeal in Civil Action No. 78-62 and no reason has been alleged justifying relief from the operation of this final judgment.

Finding no basis to entertain a Rule 60(b) action, this matter is dismissed.

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\* Plaintiffs were aware of the trial commencing April 28, 1980, but argue that they were not notified of the trial on May 5, 1980. But no hearing or trial relating to this matter took place on that day. Plaintiffs may be confused because the minutes of April 28, 1980 and April 29, 1980 were docketed on May 5, 1980.

NUMBER:

84 - 141

IN THE SUPREME COURT  
OF THE  
UNITED STATES

Howard Scott, In derivative Action on behalf of  
LAVENDER HOUSE, INC., a public stock  
company, his wife Shirley and himself

Henry Yarbrough, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Howard L. Jenkins, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Oliver A. Darden, In derivative Action on  
behalf of the public company, LAVENDER  
HOUSE, INC.

Petitioners

vs.

Small Business Administration

Respondent

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On Appeal from the United States Court of Appeals  
For the Third Circuit in Cases No. 83-1546 and 83-1572

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REPLY BRIEF

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Henry Yarbrough  
P.O. Box 27486  
6615 Blakemore Street  
Philadelphia, Pennsylvania 19150

Howard L. Jenkins  
827 South St. Bernard Street  
Philadelphia, Pennsylvania 19143

## DECLARATION

The undersigned petitioner being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both under Section 1001 of Title 18 of the United States Code do here say:

That all the averments in the Petition for Writ of Certiorari are true and that the respondent in his Brief of Opposition has not denied any of them.

That the respondent would like to mislead this Honorable Court in believing the petitioners complaint pertains to Government Guaranteed Loans. But the principal complaint is the respondent's fraudulent misuse of stockholders monies. For in Condition No. 9, the respondents SBA Loan Agreement says "Net proceeds of the Company's public stock offering to be assigned to bank until this loan is fully paid." After the public stockholders money was delivered, the respondent misused these public funds. Henry Yarbrough having purchased 10,000 shares and Howard L. Jenkins having purchased 50 shares; both now ask that their public company, Lavender House, Inc be represented in Court in this Derivative Action.

Further, the respondent would have this Court believe that their attached MEMORANDUM of the District Court pertains to Yarbrough and Jenkins. If the Court will carefully note, the appended Memorandum pertains only to and about the Action of the layman Howard Scott and his pro se litigation.

There is nothing in this Memorandum pertaining to or giving references to Yarbrough or Jenkins; and Yarbrough is the principal movant who signed the complaint and who paid the filing cost. (Payment receipt is attached) The Memorandum is in gross error in not addressing the movants, the here petitioners Yarbrough & Jenkins. Yarbrough nor Jenkins have previously signed nor filed a complaint against the respondent.

In particular, petitioners ask this Court to decree that an *Ex Parte* trial in any court of the United States is unconstitutional.

## DECLARATION

The undersigned petitioners being hereby warned that without false statements and the like so made are punishable by fine or imprisonment, or both under Section 1001 of Title 18 of the United States Code do here say:

That all the statements in the Petition are true and that the respondent in no part of Opposition has not denied any of them.

That the respondent would like to mislead this Honorable Court in believing the petitioners' complaint pertains to Government attached bonds, but the principal complaint is the respondent's treatment of issues of stockholders' money. For in Condition No. 2, the respondent's 25th Annual Report says: "The proceeds of the Company's public stock offering to be assigned a date until this issue is fully paid." After the public stockholders' money was delivered, the respondent instead of issuing public funds Henry Yarbrough having purchased 10,000 shares and Howard L. Jenkins having purchased 50 shares both now ask that their public company, Yarbrough & Jenkins, be represented in Court as the Yarbrough Action.

Further, the respondent would have this Court believe that their attached MEMORANDUM of the District Court pertains to Yarbrough and Jenkins. If the Court will carefully note the appended Memorandum pertains only to and about the Action of the Yarbrough & Jenkins and his two co-defendants.

There is nothing in this Memorandum pertaining to or giving references to Yarbrough or Jenkins and Yarbrough is the principal movant who signed the complaint and who paid the filing cost. (Payment receipt is attached.) The Memorandum is in gross error in not addressing the movants, the petitioners Yarbrough & Jenkins. Yarbrough and Jenkins have previously signed and filed a complaint against the respondent.

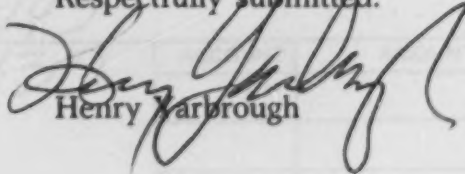
In particular, petitioners ask this Court to decree that an Ex Parte trial in any court of the United States is unconstitutional.



## CONCLUSION

The Questions of whether an *Ex Parte* Trial in a United States District Court is a violation of the absent party Due Process Constitutional right, and, whether stockholders have notification rights under Rule 23.1, FRCP, and whether a *lymans pro se* litigation is binding on un-notified absent parties have not at all been addressed or answered or denied in the Respondent's Brief in Opposition. Petitioners then Respectfully request of this Honorable Court that their Writ for Certiorari be granted.

Respectfully submitted.

  
Henry Warbrough

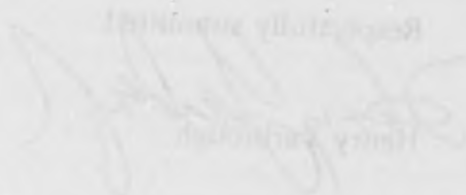
October 31, 1984



## CONCLUSION

The Question of whether an Ex Parte Tarrant is a United States District Court is a violation of the subject party that Process Constitutional right and whether such matters have notification rights under Rule 21, FRCP, and whether a system two so system is pending on unrelated special parties have not at all been submitted or answered or denied in the Respondent's brief in Opposition. Petitioner then respectfully request of the Honorable Court that their Writ for Constitutional be granted

Respectfully submitted,



Henry J. Harrison

October 31, 1984

AO 82  
(Rev. 8/80)

ORIGINAL  
RECEIPT FOR PAYMENT  
UNITED STATES DISTRICT COURT  
PENNSYLVANIA, EASTERN

8634

RECEIVED FROM

*Bill Savoy & Son*

8-143

430

Account Code

100 DEPOSIT FUND  
101 Trustee Fees  
102 Restitution  
200 REGISTRY FUND  
201 Cash Bail  
202 Land Condemnation  
GENERAL AND SPECIAL FUND  
310 Immigration Fees  
320 Attorney Admission Fee  
330 Filing Fees  
331 Civil Cases  
332 Writ of Habeas Corpus  
333 Appeals  
334 Bankruptcy Cases (Clerk's Fee)  
340 Sale of Publications  
350 Copy Fees  
360 Miscellaneous Fees  
380 Recoveries of Costs

FINES, PENALTIES AND FORFEITURES

410 Agricultural Laws  
420 Economic and Stabilization Laws  
430 Immigration and Labor Laws  
440 Customs, Commerce and Anti-Trust Laws  
450 Narcotics, Prohibition and Alcohol Laws  
460 Forfeitures of Unclaimed Money and Property  
470 Mining Enforcement and Safety Administration  
480 Internal Revenue Service (Criminal Fines)  
490 Collateral Forfeitures (CVB)  
500 Appearance Bond Forfeitures and  
Other Fines, Penalties or Forfeitures  
Not Otherwise Classified

ACCOUNT

AMOUNT

TOTAL

Case Number or Other Reference

831553 331 60.00 CC  
60.00 IL  
60.00 MTD  
IA  
.00 CAC

111 1130 4/01/83

DATE / / 19 Cash Check M.O.

DEPUTY CLERK

*McB*

BEST AVAILABLE COPY